UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEBRA ABEAR, Personal Representative of the Estate of Jason Raffelson and on behalf of T.R., the surviving child, and the ESTATE OF JASON RAFFELSON,,

Plaintiffs,

v.

CRAIG TEVELIET, individually; FAMILY PRACTICE CENTER OF GRAYS HARBOR, P.C.,a Washington professional corporation; PURDUE PHARMA, L.P., a Delaware limited partnership; THE PURDUE PHARMA COMPANY, a Delaware partnership; PURDUE PHARMA, INC., A New York corporation; THE P.F. LABORATORIES, a New Jersey corporation; THE ABBOTT LABORATORIES, an Illinois corporation; ABBOTT LABORATORIES, INC., a Delaware corporation; and JOHN/JANE DOES I - X,,

Defendants.

Case No. C06-5220 FDB

ORDER GRANTING MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

This matter comes before the Court on the motion of Defendants Dr. Craig Teveliet and Family Practice Center of Grays Harbor, P.C. to dismiss Plaintiffs' First Amended Complaint. These

Defendants assert that Plaintiffs have failed to state a claim under the Lanham Act, 42 U.S.C. § 1125(a)(1)(B) and accordingly, this Court lacks jurisdiction. Defendants further move the Court to decline supplemental jurisdiction over the remaining state law claims. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants Defendants' motion and dismisses Plaintiff's amended complaint in its entirety for the reasons stated below.

INTRODUCTION AND BACKGROUND

This is a wrongful death action. Plaintiffs' First Amended Complaint alleges that the actions of Defendants Dr. Teveliet, Purdue Pharma, L.P. *et al.* ("Purdue") and Abbott Laboratories, Inc. *et al*. ("Abbott") led to Jason Raffelson's drug addition to the prescription drug, OxyContin, and his subsequent death. The sole federal law claim is an allegation that Purdue's and Abbott's actions and conduct in marketing OxyContin was a violation of 15 U.S.C. § 1125(a)(1)(B) of the Lanham Act.

Federal jurisdiction is asserted on the basis of 28 U.S.C. § 1331 , which authorizes federal district court jurisdiction over civil actions arising under the laws of the United States, and 15 U.S.C. § 1121(a), which grants to federal district courts original jurisdiction over all actions arising under the Lanham Act. The district court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

Defendants Dr. Teveliet and the Family Practice Center of Grays Harbor move for dismissal of Plaintiffs' claims contending the First Amended Complaint does not allege facts sufficient to establish standing to maintain a Lanham Act claim. Defendants further assert that the Court should decline to exercise supplemental jurisdiction over the remaining state-law claims where the court has dismissed the sole claim on which federal jurisdiction is predicated.

STANDARDS GOVERNING MOTION TO DISMISS

Defendants move to dismiss Plaintiff's First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(h)(3) for failure to state a claim and for lack of subject matter jurisdiction.

Fed. R. Civ. P. 12(b)(1) authorizes a party to seek dismissal of an action for lack of subject matter jurisdiction. "When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001). On a motion to dismiss pursuant to Rule 12(b)(1), the standards that must be applied vary according to the nature of the jurisdictional challenge. A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either "facially" or "factually." Thornhill Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). If the challenge to jurisdiction is a facial attack, i.e., the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Miranda v. Reno, 238 F.3d 1156, 1157 n. 1 (9th Cir. 2001).

Additionally, Fed. R. Civ. P.12(h)(3), which governs the waiver or presentation of certain defenses, provides that the court shall dismiss an action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." See, Augustine v. U.S., 704 F.2d 1074 (9th Cir. 1983).

On a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the court must construe the complaint in the light most favorable to the plaintiff, taking all his allegations as true and drawing all reasonable inferences from the complaint in his favor. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Doe v. U.S., 419 F.3d 1058, 1062 (9th Cir. 2005). The complaint need not set out the facts in detail; what is required is a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a);

La Salvia v. United Dairymen, 804 F.2d 1113, 1116 (9th Cir. 1986). Thus, the court's task is merely to assess the legal feasibility of the complaint. Cooper v. Parsky, 140 F.3d 433, 440 (2nd Cir. 1998).

LANHAM ACT STANDING

Plaintiffs assert but one federal cause of action. In paragraph 32 of the First Amended Complaint, Plaintiffs allege the actions and conduct of Purdue and Abbott violated 15 U.S.C. §1125(a)(1)(B) of the Lanham Act. Defendants move to dismiss Plaintiff's First Amended Complaint on the grounds that the factual allegations fail to state a claim under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) and thus, there is a lack of federal subject matter jurisdiction.

The Lanham Act creates a civil remedy against persons or entities who engage in "false designations of origin, false descriptions, and false representation in the advertising and sale of goods and services." Waits v. Frito-Lay, 978 F.2d 1093, 1106 (9th Cir. 1992). Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), provides in relevant part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, ...shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prohibits the use of false descriptions and false representations in the advertizing and sale of goods and services. Jack Russell Terrier Network of Northern Ca. v. American Kennel, 407 F.3d 1027, 1036 (9th Cir. 2005). To prove a Lanham Act false-advertising claim, plaintiff must establish (1) defendant made a false statement of fact about its own or another's product in a commercial advertisement; (2) the statement actually deceived or had the tendency to deceive a substantial segment of defendant's audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) defendant caused its falsely advertised product to enter interstate commerce; and (5) plaintiff has been or is likely to be injured as the result of the

false statement either by direct diversion of sales from itself to defendant, or by lessening of the goodwill which its products enjoy with the buying public. Rice v. Fox Broadcasting Co., 330 F.3d 1170, 1180 (9th Cir. 2003).

To maintain a claim under the Lanham Act, a party must have standing. Jack Russell, at 1037; Waits, at 1107-1109. Section 43(a) permits "any person who believes that he or she is likely to be damaged" by the proscribed conduct to bring a civil action. 15 U.S.C. § 1125(a)(1); National Licensing Ass'n, LLC. v. Inland Joseph Fruit Co., 361 F.Supp.2d 1244, 1256 (E.D. Wash. 2004). Despite this broad language, the focus of the statute is on anti-competitive conduct in a commercial context, and the statute limits standing to a narrow class of potential plaintiffs possessing competitive or commercial interests harmed by the targeted conduct. Jack Russell, at 1037; Barrus v. Sylvania, 55 F.3d 468, 469-70 (9th Cir. 1995). See also, Made in the USA Foundation v. Phillips Foods, Inc., 365 F.3d 278, 280 (4th Cir. 2004); Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 561 (5th Cir. 2001); Stanfield v. Osborne Indus., 52 F.3d 867, 873 (10th Cir. 1995); Serbin v. Ziebart Int'l Corp., Inc., 11 F.3d 1163, 1179 (3rd Cir. 1993); Dovenmuehle v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697, 700 (7th Cir. 1989); Colligan v. Activities Club of New York, 442 F.2d 686 (2nd Cir. 1971). To establish standing pursuant to the "false advertising" prong of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), a plaintiff must show (1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is competitive, or harmful to the plaintiff's ability to compete with the defendant. Jack Russell, at 1037; Barrus, at 469-470. Consumers do not meet the standing requirement for the Lanham Act. Barrus, at 470; Von Grabe v. Sprint PCS, 312 F.Supp.2d 1285, 1302 (S.D. Cal. 2003).

In the instant case, Defendants argue that Plaintiffs' attempt to assert Lanham Act violations, specifically section1125(a)(1)(B), is incurably deficient. Defendants are correct. Plaintiffs' allegations are that of a consumer of the product OxyContin and targets of the marketing practices of Purdue and Abbott. Plaintiffs simply do not possess, or allege, any competitive or commercial

interests harmed by the targeted conduct. Thus, Plaintiffs lack standing to maintain a Lanham Act claim. Accordingly, the sole claim upon which federal jurisdiction is predicated is subject to dismissal.

SUPPLEMENTAL JURISDICTION

The Court has supplemental jurisdiction over plaintiff's state-law claims pursuant to 28 U.S.C. § 1367(a). Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over state law claims where the court has dismissed all claims over which it has original jurisdiction. Voigt v. Savell, 70 F.3d 1552, 1565 (9th Cir. 1995). "In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (1988). The balance of factors generally indicates that a case belongs in state court when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain. Id.

Here, Plaintiffs' sole federal claim is being dismissed prior to trial. Because the Court is able to decide Plaintiffs' federal claim without reaching the issues underlying Plaintiff's state-law claims remaining in this case, the Court declines to exercise supplemental jurisdiction over the state law claims pursuant to 28 U .S.C. § 1367(c)(3). See, Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997).

CONCLUSION

For the reasons stated above, Plaintiffs' have failed to state a claim pursuant to the Lanham Act and the Court declines to exercise supplemental jurisdiction over the state law claims. Plaintiffs' First Amended Complaint is subject to dismissal for failure to state a claim and lack of subject matter jurisdiction.

ACCORDINGLY,

IT IS ORDERED:

Defendants' Craig Teveliet M.D. and Family Practice Center of Grays Harbor, P.S.'s Motion to Dismiss Plaintiffs' Amended Complaint [Dkt. #18] is **GRANTED**. The Lanham Act claim is dismissed with prejudice and the state law claims dismissed, as this Court declines supplemental jurisdiction.

DATED this 28th day of August, 2006.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE